BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.
OPINIONS OF THE COURTS BELOW

The opinion, including the dissenting opinion, of the Supreme Court of Michigan is reported in 309 Mich. 391, and is printed at pages 174-187 of the record.

The opinion of the trial court, in denying the motion for new trial, is unreported, and appears in the printed record at pages 168-171.

II.
JURISDICTION

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C., Section 344).

III.
STATEMENT OF CASE

A summary statement of the case has already been made in the Petition for a Writ of Certiorari under heading I, which is hereby adopted and made a part of this brief.

IV.

SPECIFICATIONS OF ERROR AND SUMMARY OF ARGUMENT

The Supreme Court of Michigan erred in holding that the use of the incriminating testimony, unconstitutionally coerced from petitioner by the so-called "one-man grand jury," to convict him of a subsequent crime, did not deprive petitioner of due process and equal protection of the law, as guaranteed by Section 1 of the 14th Amendment of the Constitution of the United States.

ARGUMENT

In December, 1939, Judge Homer Ferguson was sitting as a one-man grand jury, under secs. 17217, *et seq.*, Comp. Laws 1929, of the State of Michigan (Stat. Ann., secs. 28.943, *et seq.*) investigating certain gambling offenses in Wayne County (R. 96). Petitioner was summoned before him and questioned with reference to his own gambling operations. The record shows that the following transpired there (R. 14-15):

> "Q. (By Mr. O'Hara†) You have been engaged in operating a policy game in this town?
>
> A. I refuse to answer for fear it might incriminate myself. * * *
>
> Mr. O'Hara: I ask the Court to grant this man immunity under the statute, and require him to an-

† The *Amicus curiae* appointed by Judge Ferguson (R. 96).

swer the questions put to him, the same as though they were reduced to writing, pursuant to the statute, so that he will not be prosecuted for any answers that he gives on this record.

The Court: The law provides that when you claim a privilege that way, the Court can grant you immunity. Now, according to the statute in this case made and provided the Court does now grant you immunity the same as if each of these questions was in writing, and your answer in writing; *now the Court must require you, after granting you this immunity, that you answer the questions;* now when they ask you similar questions that might incriminate you, I will take it that you are claiming the same privilege, and I am now granting you immunity on all the questions and all the answers in this record. *So now you must answer."* (Emphasis supplied.)

At a later point in the examination, petitioner again refused to answer but was compelled to do so on threat of punishment (R. 17):

"During the time that you became associated with him, isn't it a fact that you were paying $100 a month to Mr. Watson, was charged up against your profit and loss account, for protection from the Prosecutor, McCrea?

A. Should I claim that it might incriminate me?

The Court: I grant you the same privilege as I heretofore granted you under the statute, the same as if the question was in writing, and *I now require you to make the answer. That will apply to all your questions, so you can go ahead and answer."* (Emphasis supplied.)

Mr. O'Hara, in these proceedings, was not acting as a representative of either the prosecuting attorney or the

attorney general, but merely as *amicus curiae* to the Court. The immunity sought to be conferred on petitioner was pursuant to sec. 17220, Comp. Laws 1929 of the State of Michigan (Stat. Ann., sec. 28.946), which provides:

> "No person shall upon such inquiry be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge, and any such questions and answers shall be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him."

Subsequently, at the trial of *People v. Roxborough*, petitioner was called as a witness for the people. He is now charged with having committed perjury in that trial, and has been convicted of this crime by the Recorder's Court of the City of Detroit (R. 158) as affirmed by the State Supreme Court (R. 188). He was sentenced to prison for a term of 2 to 15 years (R. 158).

On the trial in the present case, the people, in order to prove the falsity of the testimony given by petitioner in the *Roxborough* trial, introduced in evidence the transcript of petitioner's testimony given previously before Judge Ferguson. This testimony was read at length to the jury (R. 14-23). It is apparently conceded that the testimony thus used was material and persuasive in petitioner's conviction, and if erroneously admitted, must result in reversible error†. Nor is any other conclusion warranted by the record.

†The majority opinion states "It appeared that certain parts of his testimony in the *Roxborough* Case were contrary to and in conflict with his grand-jury testimony on the same subjects" (R. 175).

Petitioner's counsel requested the Trial Court to strike the grand jury testimony, on motion for directed verdict (R. 133-4, 137-9), and again on motion for new trial (R. 165-6) on the ground that the supposed immunity granted petitioner by Judge Ferguson was a nullity since the motion therefor was made by Mr. O'Hara, a mere *amicus curiae*, and not by a prosecutor's or attorney general's representative, as required by the statute, and that, consequently, petitioner's constitutional right not to incriminate himself† had never been overcome and still protected him. The Trial Court, although conceding the irregularity of the immunity granted, nevertheless upheld the admission of the testimony on the ground that petitioner "relied upon that immunity, and gave voluntary answers" (R. 170). The same objection was pressed on appeal to the State Supreme Court and in petitioner's application to that court for re-hearing (R. 193-200).

Petitioner also claimed that the use of such self-incriminating statements thus forced or tricked from him, denied him due process of law in violation of the Constitution (R. 200). The point was vehemently urged to the State Supreme Court and briefed in the application for rehearing (R. 200). But that Court carefully avoided the decision of this fundamental question by holding the grand jury evidence admissible.

The majority of the State Supreme Court readily concede that the supposed immunity granted petitioner was a nullity and "his refusal to answer would not have placed him in contempt" (R. 177). The concurring opinion, moreover, concedes that "the so-called immunity granted

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†Article II, sec. 16, of the Michigan Constitution of 1908 provides that "No person shall be compelled in any criminal case to be a witness against himself."

defendant in the grand jury proceedings was a nullity insofar as making him immune from prosecution for criminal acts testified to in such proceedings Such testimony must be considered to have been given involuntarily and as such was inadmissible . . ." (R. 179).

But the majority nevertheless hold the evidence admissible against petitioner because "he apparently testified before the grand jury in reliance upon and without questioning the legality of the purported grant of immunity" (R. 177).

The record shows, however, that he testified in fear of going to prison. When he first refused to answer because he feared to incriminate himself, Judge Ferguson said (R. 15):

> "Now when they ask you similar questions that might incriminate you, I will take it that you are claiming the same privilege, and *I am now granting you immunity on all the questions and all the answers in this record. So now you must answer. All right.*" (Emphasis supplied.)

Later, when he again refused to answer incriminating questions, Judge Ferguson said (R. 17):

> "I grant you the same privilege . . ., and *I now require you to make answer. That will apply to all your questions, so now you can go ahead and answer.*" (Emphasis supplied.)

Confessions or admissions thus obtained under duress or compulsion are never admissible.

> *State v. Clifford*, 86 Iowa 550;
> *People v. Wolcott*, 51 Mich. 612;
> *Simmons v. State*, 79 Tex. Crim. Rep. 341;

Shoeffler v. Wisconsin, 3 Wis. 823;
22 *Corpus Juris Secundum*, 1002.

See also:

Regina v. Garbett, 2 Car. & K. 474, 495.

The decision in the instant case is wholly irreconcilable with the unswerving policy of the State Supreme Court condemning the fruits of any search and seizure made in violation of constitutional safeguards.

Cf. *People v. Hagadorn*, 255 Mich. 121.

In the illegal search and seizure cases, the evidence is intrinsically competent, but only by suppression of the fruits can the spirit and purpose of the Constitution be perpetuated.

People v. Halvesz, 215 Mich. 136, 138;
Cf. *McNabb v. United States*, 318 U. S. 332, 345.

The same rule must apply when the incriminating material is unlawfully taken from the mouth of the witness as applies when a document is unlawfully taken from his desk.

The applicable rule is stated in American Law Institute, Model Code of Evidence, Rule 232, page 171:

> "Evidence of a statement or other disclosure made by a person is inadmissible against him if the judge finds that he had and claimed a privilege to refuse to make the disclosure but was nevertheless required to make it."

The conviction of petitioner was accomplished by the use of self-incriminating evidence unconstitutionally co-

erced from him by Judge Ferguson. In fact, since that entire proceeding before Judge Ferguson was in direct violation of the constitutional provision against self-incrimination, that testimony was a nullity and could not be used for any purpose.

Emery v. State, 57 Tex. Crim. Rep. 423.

Failure to pursue constitutional provisions results in a suspension of the Court's jurisdiction to proceed.

Johnson v. Zerbst, 304 U. S. 458;
Cf. *Ex parte Fisk*, 113 U. S. 713.

A conviction resting on evidence secured through a flagrant disregard of the procedure which the law commands, cannot be allowed to stand.

McNabb v. United States, supra.

The use of self-incriminating statements judicially coerced from petitioner to bring about his conviction is a denial to him of that due process of law guaranteed him by the 14th Amendment to the Constitution of the United States.

The use of confessions coerced from a defendant to obtain his conviction voids a trial for it denies to him due process of law.

Lisenba v. California, 314 U. S. 219;
Ward v. Texas, 316 U. S. 547.

The concept of due process of law voids a trial in which, by threats or promises in the presence of the court, a defendant is induced to incriminate himself.

Lisenba v. California, supra.

Recently, on May 1, 1944, this Court in *Ashcraft v. Tennessee*, 322 U. S. 143, reversed a conviction obtained by the use of confessions coerced by law enforcement officers.

That case held (322 U. S. 155):

> "The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession."

Under the holding of that case, moreover, this Court is required to make an independent examination of petitioner's claim regardless of the findings of the jury and the state courts.

CONCLUSION

The use of the self-incriminating statements judicially extorted from petitioner by the one-man grand jury, to obtain the present conviction, denied him due process of law, and the protection of the 14th Amendment to the Constitution of the United States. Coercion by the judiciary which, for a free people, must always be the quintessence of integrity, is much more insidious than the usual confession extorted by police officers, for from them there is an appeal to the courts. But from the courts there can be no appeal.

Petitioner has been compelled to incriminate himself by forcing him to surrender his right to immunity.

We therefore pray that a writ of certiorari issue from this Court to the Supreme Court of the State of Michigan to review its affirmance of said conviction of petitioner by the Recorder's Court for the City of Detroit, in the said State of Michigan, and said Court's denial of his application for rehearing, and that the judgment of said Court be reversed on hearing and the cause remanded for further proceedings within the limitations of established constitutional restraints.

Respectfully submitted,

GEORGE STONE.
2163 Penobscot Bldg.,
Detroit 26, Michigan,
Counsel for Petitioner.